

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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MAR 14 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 93-94
Scripps Howard Broadcasting Company)	FCC File No. BRCT-910603KX
For Renewal of License of Station WMAR-TV, Baltimore, Maryland)	
and)	
Four Jacks Broadcasting, Inc.)	FCC File No. BPCT-910903KE
For a Construction Permit)	
For a New Television Facility on Channel 2 in Baltimore, Maryland)	

TO: The Honorable Richard L. Sippel
Presiding Administrative Law Judge

OPPOSITION TO MOTION FOR SUMMARY DECISION
BY FOUR JACKS BROADCASTING, INC. AND CROSS-MOTION FOR
SUMMARY DECISION DISQUALIFYING FOUR JACKS BROADCASTING, INC.

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SUMMARY

Scripps Howard Broadcasting Company ("Scripps Howard") hereby opposes the Motion for Summary Decision ("Motion") filed by Four Jacks Broadcasting, Inc. ("Four Jacks") on the misrepresentation/lack of candor issue pending against it. In addition, based on the record as it has been supplemented by the Motion's presentation of Four Jacks' affirmative case, Scripps Howard hereby seeks summary decision disqualifying Four Jacks.

The issue presented here, as Four Jacks notes, is not complex. It is whether the principals of Four Jacks misrepresented or lacked candor regarding their pledges to resign from their then-current employment if Four Jacks is successful in its application for Channel 2. Given the record now before the Commission, this question can be answered in the affirmative and summary decision against Four Jacks should thus be granted.

First, as demonstrated herein, there is no genuine issue of material fact precluding the entry of summary decision against Four Jacks. The record shows that the Four Jacks principals' pledges to the Commission to resign from their "then-current employment" are contradicted by representations they made under penalty of law through their company, Sinclair Broadcast Group, Inc. ("Sinclair"), to the Securities and Exchange Commission ("SEC"). Four Jacks' Motion demonstrates that the applicant stands by those SEC statements. Furthermore, the record, including Four Jacks' own application for Channel 2, conclusively demonstrates that throughout this proceeding, until Four Jacks'

Motion, Four Jacks' principals were themselves stating that they are employees of Sinclair. Yet, despite overwhelming evidence on this point, Four Jacks has chosen to hinge its affirmative case on further fruitless attempts to dissociate its principals' words from their obvious meaning by claiming that neither David, Frederick, or Robert Smith are employed by Sinclair.

Relatedly, each of the Motion's attempts to identify affirmative statements by Four Jacks' principals which demonstrate that they did not promise to resign their employment at Sinclair either completely fails to support that position or affirmatively undermines it. Even the Four Jacks principals' declarations attached to the Motion do not expressly deny that they are employees of Sinclair. Instead, the declarations merely assert the unsubstantiated and untenable position that these principals' intent was not to include their Sinclair positions as their employment in their integration statements.

In addition, Four Jacks' claim that the Presiding Judge added this issue on the basis of erroneous findings is completely without merit. Likewise, contrary to Four Jacks' claim, the record provides ample evidence of an intent to deceive on the part of Four Jacks' principals. This is especially so given Four Jacks' failure to produce in discovery any of the SEC filings.

Finally, summary decision against Four Jacks is appropriate given the procedural posture of this case. Sufficient relevant evidence already is in the record to conclude that Four Jacks misrepresented and/or lacked candor, and Four Jacks had express

notice that it confronted a misrepresentation/lack of candor issue before it insisted on exposing itself to the prospect of decision without full hearing on that issue. Indeed, the case Four Jacks chose to present in its Motion offers no credible exculpatory facts and fully evidences the applicant's intent to rely on wholly untenable positions. Under these circumstances, precedent permits disqualifying findings to be entered against Four Jacks without further proceedings.

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To: The Honorable Richard L. Sippel
 Presiding Administrative Law Judge

OPPOSITION TO MOTION FOR SUMMARY DECISION
 BY FOUR JACKS BROADCASTING, INC. AND CROSS-MOTION FOR
SUMMARY DECISION DISQUALIFYING FOUR JACKS BROADCASTING, INC.

I. INTRODUCTION

1. Scripps Howard Broadcasting Company ("Scripps Howard"), by its counsel, hereby opposes the Motion for Summary Decision (the "Motion") filed by Four Jacks Broadcasting, Inc. ("Four Jacks") on February 28, 1994. The Motion must be denied in light of evidence in the record that the Four Jacks principals made misleading statements before the Federal Communications Commission ("Commission") that they would resign their current employment at Sinclair Broadcast Group, Inc. ("Sinclair") should Four Jacks be successful in obtaining Channel 2. These statements were expressly contradicted by statements filed with

the Securities and Exchange Commission ("SEC") after the record closed in this proceeding. None of the attempted explanations for these contradictions is credible, and in fact, Four Jacks' Motion largely rehashes arguments already considered and rejected in the order granting Scripps Howard's motion to enlarge. See Order FCC94M-51 (released Feb. 1, 1994) ("Order"). Furthermore, Four Jacks' claim that the addition of the misrepresentation issue was based on erroneous findings is without foundation. Finally, the circumstances surrounding this conflict in representations strongly suggests an intent to deceive. For example, the existence of SEC documents which addressed the Sinclair principals' future employment plans was not disclosed to Scripps Howard or the Commission in discovery despite the fact that the SEC documents, from the start, plainly fell within the scope of Scripps Howard's continuing document production request. For all these reasons, Four Jacks' Motion for Summary Decision should be denied.

2. Separately, summary decision against Four Jacks is warranted. As Four Jacks' Motion notes, the issues here are not complex. See Motion at iii. Four Jacks' principals made repeated promises to the Commission to resign their current employment in order to manage Channel 2 if they should be successful. Then, when forced to describe their employment plans in connection with their effort to obtain public financing for their existing company and its expansion plans, they very reluctantly conceded in filings required by the SEC that they did

not intend to resign from that company or even to reduce the scope of their current duties should they obtain Channel 2. Then, while on full notice that misrepresentation and lack of candor issues were raised by their conduct, Four Jacks has offered in its Motion an affirmative case that depends on plainly impossible interpretations of its principals' words and actions.

3. Given Four Jacks' voluntary pursuit of summary decision without a hearing on the misrepresentation and lack of candor questions and the patently unavailing nature of its affirmative case, Four Jacks has voluntarily exposed itself to the recognition of its plain misconduct before the Commission without further proceedings. Accordingly, summary decision disqualifying Four Jacks as an applicant for Channel 2 is warranted.

II. FOUR JACKS CANNOT EXPLAIN AWAY THE INCONSISTENCIES ON THE RECORD REGARDING ITS PRINCIPALS' PLEDGES TO RESIGN FROM THEIR THEN-CURRENT EMPLOYMENT.

4. Contrary to the central premise of Four Jacks' Motion, the record in this case establishes that Four Jacks' principals made misleading and contradictory statements regarding whether they intend to resign their employment at Sinclair if they are successful in obtaining Channel 2. The Motion's attempt to explain these contradictions conflicts with the plain meaning of the words "employee" and "employment", including the way those words have been used by Four Jacks' principals themselves.

A. The Four Jacks Principals' Pledges to Resign from Their "Then-Current Employment" Are Contrary to Representations Contained in Sinclair's Filings with the Securities and Exchange Commission.

5. David, Robert and Frederick Smith ("the Smiths") all have pledged that, in the event that Four Jacks obtains Channel 2, they "will resign from [their] then-current employment and will limit or terminate any other activities that might interfere with [their] integration commitment." See, e.g., FJ2 at 1; FJ3 at 1; FJ4 at 1.

6. Notwithstanding the language of the integration pledges, the Four Jacks principals, through their wholly-owned Company, Sinclair, have advised potential investors in Sinclair that the Smiths will be able to continue all their "current duties" with the company in the event that Four Jacks obtains Channel 2. These representations to potential investors are contained in a registration statement and prospectus filed by Sinclair with the SEC. See Order at 1-3 (quoting these documents).

7. The contradiction is straightforward: Four Jacks' principals repeatedly advised the Commission that they would resign their other employment if they obtained Channel 2, but then they advised potential investors in Sinclair under penalty of law that they believed that their status and duties at Sinclair would not undergo any change if they obtained Channel 2. Id. Unless Four Jacks' principals are not employed at Sinclair, it is unavoidable that they have misrepresented their intentions to either the Commission or the SEC. Four Jacks' pleadings on

the misrepresentation issue and the Motion do not attempt to refute the SEC documents, and thus, if their employment status at Sinclair is confirmed, a question of misrepresentation to the Commission is necessarily established with respect to a central element of Four Jacks' comparative case.

B. The Record Demonstrates Unequivocally that the Four Jacks Principals Are in an "Employment" Status at Sinclair.

8. In its Motion, Four Jacks repeats its attempt to reconcile the inconsistencies regarding its principals' integration pledges by arguing that these principals are not currently "employed" at Sinclair or "employees" of Sinclair, and thus that their pledges to resign from their "then-current employment" do not implicate their positions at Sinclair. See, e.g., Motion at 13. The Presiding Judge, however, rejected this argument, concluding based on the record before him that circumstances "show Sinclair to be [the Smiths'] 'then-current employment.'" See Order at 4.

9. Indeed, Four Jacks' continuing efforts to defend its position on this issue serve only to further undermine its principals' credibility. Four Jacks' contentions on this point distort the plain language of the record. Further, Four Jacks' Motion ignores key evidence in the record in which its own principals, without prompting, used the term "employee" to describe their status at Sinclair. Given the critical importance of this point, this pleading will again document the overwhelming nature of the evidence that Four Jacks' principals (1) are

employees of Sinclair and (2) so recognized themselves as employees during the entire course of the comparative proceeding.

10. First, in the first and principal document of Four Jacks' case, its application for Channel 2 (the "Application"), Four Jacks stated that "in mid-1988, [Robert Smith] became a full-time employee of Channel 45's parent, Sinclair Broadcast Group, Inc." Application at Exhibit 6 (Integration Statement) at 2-3 (emphasis added) (copy of this Integration Statement attached). The Application likewise states that Frederick Smith "became a full-time employee of Sinclair Broadcast Group, Inc. on July 1, 1991." Id. at 3 (emphasis added).¹ The Order notes these references. Order at ¶ 11.

11. After describing these two principals as Sinclair "employees," the Application then states--beginning on the next page--the promise that these same principals "will resign from their then-current employment" in order to manage Channel 2. See Application at Exhibit 6 (Integration Statement) at 4-5. Thus the core Four Jacks document itself directly contradicts the key argument in Four Jacks' Motion. Four Jacks' failure to even recognize this elemental flaw in its position appears fatal by itself to the grant of its Motion.

12. Second, contrary to the Motion's claim, overwhelming additional evidence from the Smiths' own words further undermines the "non-employee" claim. For example, the hearing testimony

¹ It should be noted that July 1, 1991 was only two months before the Application was filed.

demonstrates both that the Smiths are employed at Sinclair and that they regarded their positions to be that of employees at that time. During the cross examination of Robert Smith, for example, the following exchange took place:

Q. What is your present employment?

A. My present employment? I'm the vice president and treasurer of Sinclair Broadcast Group, Inc.

T. at 1239. During the cross examination of Frederick G. Smith, a similar exchange took place:

Q. And you are, as you've told us, employed by Sinclair Broadcast Group, Inc.

A. Correct.

Q. That's your employment, right?

A. Correct.

Q. Okay, and you're employed there as are your brothers David, Robert -- and Robert, is that correct? []

A. Correct.²

T. at 1371.

13. Four Jacks' efforts to avoid the plain meaning of its principals' testimony on these points during cross-examination again serves only to undermine its credibility. **From the beginning of the case (the filing of the Application) to the end of the comparative phase of this proceeding (the hearing itself),**

² Contrary to Four Jacks' portrayal of the cross examination at the hearing as misleading, see Motion at 13, Mr. Greenebaum gave Frederick Smith three opportunities to disagree with the characterization of his position at Sinclair as employment; Frederick Smith did not, however, take the opportunities to refute the term.

Four Jacks' principals consistently described themselves as employees of Sinclair.

14. Third, it simply cannot be argued plausibly that three persons working on behalf of Sinclair during the hours of 9 a.m. to 5 p.m., 5 days a week, and who receive substantial compensation for "services rendered" to Sinclair, are not currently "employed" at Sinclair. See Scripps Howard Motion to Enlarge, filed Dec. 9, 1993, at ¶¶ 5, 10. Such a contention defies common sense as well as the record.

15. Fourth, the SEC documents in fact reveal that even the Sinclair/Four Jacks principals do not use the term "employee" in the bizarre way that the Motion asserts it must be used. That is, the Motion states that "owners," "executives," "bosses," and "managers," "cannot be characterized as 'employees.'" See Motion at 13 (emphasis added). Compare that extraordinary claim about English usage with these same principals' own use of the term "employed" in their company's SEC statements. There, Frederick G. Smith, it is stated, "was employed by Frederick G. Smith, M.S., D.D.S., P.A., a professional corporation of which Dr. Smith was the sole officer, director and stockholder." See, e.g., SH34 at 57 (emphasis added). Thus, in a situation where Fred Smith was the sole "owner" and "boss," Sinclair described him as "employed" by his own corporation.

16. Finally, the actual declarations of the Four Jacks principals, despite the Motion's claim to the contrary at 14, ¶ 23, do not expressly "refute" that they are "employees" of

Sinclair. These sworn statements only claim quite carefully that the principals' use of the term "then-current employment" did not "refer to [their] ownership or executive position[s] in Sinclair. . . ." See, e.g., Motion, Declaration of David Smith at 3. This is merely a self-serving declaration of subjective intent, not, as the Motion misleadingly asserts, a statement of fact that could be tested by external evidence such as company records. Indeed, while much information in the company's business records would no doubt be relevant to this issue, none was offered to support their claimed non-employee status.

C. Even Putting Aside the Meaning of "Then-Current Employment" in the Integration Statements, Four Jacks' Principals Have Not Been Consistent Regarding Their Intention to Continue Their Employment with Sinclair.

17. Relatedly, Four Jacks again argues that it has been consistent throughout this proceeding with respect to its principals' proposals concerning their employment with Sinclair if Four Jacks should obtain Channel 2. See Motion at 3. In addition to the inconsistencies identified above, however, Four Jacks' current contention that its principals never intended to resign from Sinclair is directly at odds with the testimony of David Smith during the hearing. When David Smith was asked whether Sinclair's September 28, 1993, Registration Statement contained any reference that he would terminate his then-current employment or any activities that might interfere with his integration commitment, the testimony went as follows:

Q. I'm afraid it's going to be the third version of [the question], but I'll do the best I can. Isn't it a fact that nowhere in Exhibit

26, the S.E.C. filing they distribute to the public for investment purposes, is there any reference to your pledge to divest yourself -- to terminate your then-current employment or divest yourself of any activities that might interfere with your integration commitment in this proceeding?

A. If there is a reference, I think the reference is as required on Page 17 of the document and it's a reference that you've already referenced which is Control by Stockholders; Dependence Upon Key Personnel. I think the document fairly, clearly says that the company may be dependent. That's why it's disclosed. In the event that I leave the company as a result of being successful with Four Jacks, the public has been advised.

Q. What language do you see that says the public has been advised that you're going to leave if Four Jacks is successful?

A. I read that document to suggest and make clear to the public that in the event that I am not there as a key personnel or that other people as key personnel aren't there, they're so advised and the success or failure of the company may or may not happen.

T. at 1096-97 (second and third emphasis added). Thus, David Smith volunteered under oath that he could "leave the company as a result of being successful with Four Jacks." Then, in response to a follow-up question that could not be clearer, he accepted without quarrel the premise that he would in fact leave Sinclair if Four Jacks is successful, and he testified that the September 28, 1993, SEC filing adequately disclosed that risk. This testimony simply cannot be squared with Four Jacks' position that the Smiths have consistently maintained that they "will be able to perform their duties as owners and executives of Sinclair while carrying out their Four Jacks integration pledges." See

Motion at 10. This testimony--plus the Smiths' repeated pledges to resign their employment--leave no doubt that the Four Jacks principals have not been consistent or forthcoming with the Commission regarding their intention to remain employed at Sinclair.

D. The Fact that the Smiths Do Not Have Employment Agreements with Sinclair Does Not Offer Any Support for Four Jacks' Claim that the Smiths Are Not Employees of Sinclair.

18. The Motion's attempted reliance on the disclosure in the SEC filings that none of the Smiths has an "employment agreement" with Sinclair to prove that they are not employees of Sinclair is woefully misplaced. See Motion at 10-11. First, the vast majority of America's "employees" do not have employment agreements. Thus, stating that the Smiths do not have employment agreements does not in any way support Four Jacks' claim that the Smiths are not employees.

19. Second and more importantly, the quoted language appears in Sinclair's SEC filings under "Risk Factors," i.e., things for potential investors to note with caution. See, e.g., SH31 at 12. Information would not be presented in that section merely to advise investors of a neutral fact. The Smiths' lack of employment agreements instead apparently was disclosed to advise investors that the Smiths' status at Sinclair was not protected by such agreements. That is, the logical reading of the language is that it is a warning to potential investors that, while the Smiths are now employees of Sinclair, they are under no

contractual obligation to remain in that relationship in the future.

20. Four Jacks' Motion itself confirms that this language was offered to warn of the Smiths' ability to leave the company at will. See Motion at 9-10 ("language [in the SEC statements] puts investors on clear notice of the potential loss of the Smiths' services for Sinclair"). If the Smiths were not employees, this warning easily could have been phrased appropriately so as to convey their non-employee status, for example, by referring to the lack of any "management" or "service" contract rather than "employment agreement."

21. Accordingly, contrary to the Motion's claims at 10-11, this statement in the SEC filing actually appears to support the plain fact that the Smiths are currently in "employment" at Sinclair. Importantly, this also demonstrates that Four Jacks' claim that Scripps Howard intentionally omitted this language in its pleadings for some improper purpose, see Motion at 10-11, is wholly false.

E. Four Jacks' Arguments Concerning Divestiture Are Irrelevant to the Misrepresentation Issue.

22. In arguing that summary decision on its behalf is appropriate, Four Jacks' Motion makes repeated references to Four Jacks' divestiture commitment. See Motion at 4-7. It contends that Four Jacks' principals never proposed to "divest" their positions as officers, directors and shareholders of Sinclair and that, until the filing of its motion to enlarge, Scripps Howard never displayed any confusion as to the nature of its divestiture

pledge. Motion at 4-5. In fact, neither Scripps Howard's motion to enlarge nor the Order designating the issue have yet displayed any such confusion. It is Four Jacks' Motion which attempts to create confusion between the divestiture promise and Four Jacks' integration pledges.

23. Four Jacks' arguments regarding its divestiture pledge are simply irrelevant to the misrepresentation issue.

"Divestiture" is used in Commission proceedings to address the means by which an applicant will come into compliance with the multiple ownership rule. Integration commitments, on the other hand, concern, inter alia, how the applicant's principals propose to spend their time should they be successful in obtaining a station. There is no dispute about the scope of Four Jacks' divestiture commitment: the Four Jacks principals promised to sever their ownership and other interests in Channel 45 as required by Section 73.3555. Four Jacks' principals did not represent that they would give up their ownership interests in Sinclair's other stations, and Scripps Howard has never suggested otherwise. The crucial language that is the subject of the misrepresentation issue is instead, however, the Smiths' pledge to resign from their "then-current employment," not whether they would "divest" their interests as owners of Sinclair.

24. Similarly, while Four Jacks points out that its principals never expressly stated that they would resign their positions as "officers" and "directors" of Sinclair, this too is irrelevant to its case. Four Jacks argues that its silence on

this point affirmatively demonstrates its principals' intent to retain these positions because resignation would otherwise have been disclosed for the resulting comparative advantage. See Motion at 5, ¶ 7. In fact, however, no such diversification advantage would accrue so long as their ownership interests in Sinclair's stations were retained, and their direct case testimony did make clear that these other stations would be retained.

25. Likewise, the language in their direct case testimony about Sinclair's stations each having general managers and the company having a comptroller, see Motion at 6-8, does not come close to showing that the Four Jacks principals intended to remain employees of Sinclair. It serves only to support their ability to continue as owners while devoting their full-time attention to Channel 2.

26. Even if the direct case descriptions of these other Sinclair management employees could be found to offer some support for the Smiths' remaining as Sinclair employees--which it cannot--these statements, which were not exchanged until September 13, 1993, must be read in conjunction with the Four Jacks principals' September 3, 1991 Application and May 7, 1993 Integration Statement commitments which unequivocally promised the resignation of their "then-current employment" with no hint of any continuing managerial role at Sinclair. See attached Application at Exhibit 6 (Integration Statement); see also Integration and Diversification Statement filed at the Presiding

Judge's direction on May 7, 1993. If Four Jacks intended to modify the integration commitments set out in these documents by its principals' direct case testimony, Four Jacks was obliged to do so plainly and unequivocally. It simply cannot claim credibly--after the hearing--that this language affirmatively modified its principals' previous commitments to resign their current employment.

27. Finally, while the Motion now expressly disavows that any plan has ever existed to segregate the Four Jacks' principals from their duties at Sinclair in the event they should take over managing Channel 2, see Motion at 10, ¶ 14, some such plan was certainly essential to their having any hope of obtaining the full-time integration credit they sought. See, e.g., Frank Digesu, Sr., 7 F.C.C. Rcd 5459 (1992); Julia S. Zozaya, 5 F.C.C. Rcd 6607, ¶ 3 (1990), recon. denied, 6 F.C.C. Rcd 4416 (1991). Thus, contrary to the Motion's expression of puzzlement (see Motion at ¶ 10), the Order appropriately noted that a trust or other vehicle would be expected in this situation from experienced broadcast applicants who had any hope of both retaining their outside business interests and getting full-time integration credit. Again, Four Jacks is simply straining to find fault with language in the Order. The Order in fact addressed not the proposal Four Jacks now claims to have intended--which would plainly be doomed to receive no integration credit--but instead described how the presentation they made

could have reasonably been intended to achieve the result Four Jacks claims it was seeking.³

II. FOUR JACKS' CLAIM THAT THE MISREPRESENTATION ISSUE WAS ADDED ON THE BASIS OF ERRONEOUS FINDINGS IS WITHOUT ANY FOUNDATION.

28. Four Jacks' Motion further attempts to find fault with the following language in a footnote to the Order and urges that this "error" requires the grant of its Motion:

With the juxtaposition of the consequences of full-time integration set against the assurance to potential Sinclair investors that the Smiths would remain with Sinclair on a full-time basis, even if Four Jacks wins Channel 2, there is a substantial issue of credibility raised.

Motion at 8 (quoting Order at 5, n.3) (emphasis in Motion). Four Jacks Motion claims here that the SEC documents nowhere indicate such a commitment to remain full-time, and, as discussed immediately below, the accompanying declarations remarkably deny

³ Relatedly, the Motion's discussion on divestiture is flawed for quoting out of context a statement made by the Presiding Judge at the hearing. Four Jacks contends that the Presiding Judge understood that the Four Jacks principals did not intend to leave their positions with Sinclair; in support of this proposition, Four Jacks relies, inter alia, upon the following statement:

[T]he pledge doesn't go beyond -- there's a pledge in the testimony of the undertaking, whatever -- it's a very specific one and it talks in terms only of Channel 45.

T. at 1179 (quoted in Motion at 5-6). Four Jacks ignores, however, that the Presiding Judge made this statement while examining whether Four Jacks' divestiture pledge barred them from pursuing a programming agreement between Chesapeake and WNUV in Baltimore--an issue that has nothing to do with Four Jacks' principals' professed intention to resign from their then-current employment. See T. at 1178-79.

that the SEC filings evidence any commitment to remain at Sinclair at all. The Presiding Judge's conclusion is, however, fully supported by the SEC documents.

29. The December 1993, SEC filings state both that the Smiths believed that they will be able to perform all of their current duties at Sinclair if Four Jacks should obtain Channel 2 and that these principals had not made any pledge to the FCC to resign from their official positions with Sinclair.⁴ These statements, combined with the SEC filings' description of (1) the Smiths' status as "key personnel," (2) their large salaries for "services rendered," and (3) their plans to expand the company dramatically, all plainly support the view that investors were led to believe that the Smiths were and would remain employed "full-time" at Sinclair.

30. Indeed, if there were any doubt, it is removed by express language in the SEC documents. Sinclair's SEC filings all note that Frederick Smith "join[ed] the Company full time in

⁴ For example, the December 2, 1993 Registration Statement states that:

[m]oreover, the Company believes that each of David D. Smith, Robert E. Smith and Frederick G. Smith will be able to perform all of his current duties with the Company while fulfilling his commitment to work for Channel 2.

SH33 at 19. To the extent that language in the declarations urges that none of the SEC filings "state [sic] to investors that [the Smiths] will remain with Sinclair," see David Smith's declaration at ¶ 4, this statement attempts to mischaracterize the Smiths' own expressions of belief through their company, Sinclair, that they will continue their full Sinclair duties. The SEC documents, however, speak for themselves.

1990." See, e.g., SH26 at 55 (emphasis added). In light of this express description of this perhaps least-involved principal's current "full-time" status, it was not unreasonable for the Presiding Judge to conclude that the Smiths' representations to investors that they (1) could retain their current "official positions," (2) were not required to resign as officers or directors, and (3) expected to continue to perform all their current duties at Sinclair, essentially constituted an assurance that they intended to continue their current full-time commitment to Sinclair.⁵

III. FOUR JACKS' INTENT TO DECEIVE IS STRONGLY SUGGESTED BY THE CIRCUMSTANCES SURROUNDING THE CONFLICTING STATEMENTS.

31. Four Jacks' principals filed Sinclair's first Registration Statement with the SEC on September 28, 1993. That document emphasized Sinclair's dependence upon--and the importance to that company of retaining--the Four Jacks integrated principals, especially Sinclair's President and Chief Executive Officer, David D. Smith. See SH26 at 17. Four Jacks, however, never produced to Scripps Howard in discovery any of Sinclair's SEC Registration Statements. Instead, these documents, and the important information contained therein about the Four Jacks principals' status at Sinclair, had to be both

⁵ In any event, of course, Four Jacks' attempt to paint the entire Order as hinging on the language in this footnote is wholly unwarranted.

discovered and obtained independently by Scripps Howard's counsel.

32. The SEC documents plainly fall within, inter alia, the following Scripps Howard discovery request:

[a]ny and all Documents reflecting a commitment of time, requiring the personal services, or otherwise providing any assurance of continued future involvement in activities other than the Proposed Station by each Principal, including but not limited to employment agreements, loan Documents, proxy statements or corporate annual reports, partnership agreements, or management agreements.

See Scripps Howard's Motion for Production of Documents on the Standard Comparative Issue, dated June 11, 1993, at 11 (request 21). This document production request was continuing in nature, id. at 5. Four Jacks offered no objection to it, and it was approved by the Presiding Judge. See Document Production Order, FCC 93M-399, released June 4, 1993, at 4. Scripps Howard even noted at the hearing that these SEC materials had not been produced in discovery by Four Jacks despite being within the scope of Scripps Howard's document production request, but Four Jacks took no action to supplement its mere 66 pages of produced documents.⁶ See T. at 1078-79, 1281.

⁶ In anticipation of an erroneous argument from Four Jacks that the SEC documents do not reflect a commitment of time by its principals, it is noted that the SEC documents are also responsive to other Scripps Howard document requests. For example, these documents describe a condition on the sale of Channel 45--that a Sinclair lender's approval must be obtained. See, e.g., SH31 at 16. This document thus falls squarely within Scripps Howard's request 12:

33. Precedent confirms that Four Jacks' failure to produce relevant and requested documents may be evidence that Four Jacks intended to deceive the Commission. See, e.g., WWOR-TV, Inc., 7 F.C.C. Rcd 636, ¶¶ 50-54 (1992). For example, in Omaha Channel 54 Broadcasting Group, 3 F.C.C. Rcd 870 (Rev. Bd. 1988), a question existed as to whether contradictory statements made by an applicant constituted an intentional misrepresentation or simply a mistake. The Initial Decision had disqualified the applicant for the plain conflict, but the Review Board reinstated the application on the ground that all the information had been voluntarily provided to the parties in discovery. The majority opinion expressly recognized that but for the applicant having produced the correct information in discovery, the Board would have reacted to the plain conflict in the record like the Administrative Law Judge. See id. at 874 n.3.⁷ Here there is a

[a]ny and all Documents which constitute or relate in any way to the Principals' plans to divest other Media Interests, including but not limited to negotiations, agreements, commitments, contracts, pledges or options.

See Scripps Howard's Motion for Production of Documents on the Standard Comparative Issue, dated June 11, 1993, at 8-9; see also Document Production Order, FCC 93M-399 at 3 ("commitment to divest must be unconditional").

⁷ The concurring statement by Board Member Blumenthal in Omaha was even harsher than the majority's admonishment of the applicant, Omaha Telecasters, for "deny[ing] categorically" a "facially apparent" conflict between its FCC application and its corporate articles of incorporation. Id. at 875. The concurring statement noted that "the unfortunate result may be to unavoidably call into question [the applicant's] general credibility" and that "[i]f it should suffer down the line as a result of its strategy, it will only have itself to blame." Id. It is noted that the voting principals of Omaha Telecasters